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Texas Limitations: The Twenty-Five Years Statutes

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TEXAS LIMITATIONS: THE TWENTY-FIVE YEAR STATUTES

by
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I. INTRODUCTION

STATUTES of limitation affecting real property are, to repeat an oft-used phrase, statutes of repose. They represent a balancing of the interest of the adverse occupier of property to have his title and possession quieted and the interest of the earlier "true" owner to have a fair opportunity to recover what belongs to him. In most suits where the occupier wins, he does so not so much on his own ethical merit as on the earlier owner's neglect—his failure to bestir himself and take effective steps to oust the occupier. In some instances the statutes protect an occupier who has a good ethical posture but who has lost his proofs of title. These latter instances furnish a part of the policy behind the statutes. But the main policy is that of repose: Society demands that after a person has acted as owner and possessor of property for a substantial time, he should be recognized as such and should not be subject to disturbance by a former owner.

Statutes of limitation commonly declare that a suit for recovery of land may not be brought where peaceable and adverse possession has been in the defendant for a certain number of years after the plaintiff's cause of action arose or before the action was filed.[1] All states have a general statute of limitation, most of them allowing ownership to pass by virtue of peaceable and adverse possession alone. Many states have one or more special statutes, the legislatures having differentiated among adverse occupiers according to their circumstances. An adverse occupier may have no deed at all, or he may claim under "color of title," or under a recorded or unrecorded deed, or he may claim under a deed which connects with a junior chain of title going back to the sovereign, or he may claim under a tax, execution, or

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[1] See 2 Restatement, Property at 890-94 (1936).

fiduciary's sale. He may or may not have paid taxes on the land, he may or may not have made a "claim of right," and he may or may not have acted in good faith. The periods of the statutes vary among the states from three to thirty years depending on the presence or absence of these and other circumstances.[2]

Generally, the period of a statute of limitation does not run if, at the time adverse possession begins, the owner is under a legal disability. If two disabilities exist at the time, the owner is allowed to rely upon that disability which extends for the longer period of time. But disabilities cannot be tacked, and they do not stop the period from running if they occur after adverse possession has begun.[3]

A legal disability may prevent a statute of limitation from running for many years. It has been thought that a catch-all statute of limitation, having a longer period than the other statutes prevailing in a jurisdiction, should be enacted to bar suits for recovery of land even though the earlier owner has been or still is under disability. No one denies that persons under disability are entitled to special consideration, but the chances are that over a long period of time they or those responsible for their estates will have a fair opportunity to know their rights to real property and to take action to protect them. The policy of repose is not rendered invalid and null because persons under disability are involved.

Texas has three 25-year statutes of limitation which are of a catch-all type. Two of the statutes are closely related and operate to bar claimants for land even though they have been or still are under legal disability.[4] The third statute creates a presumption that title has passed on proof of certain facts.[5] The history, interpretation, and application of these statutes will be explained in the following pages. Some suggestion will be made for improvement or clarification of the legislation.

II. History of Articles 5518 and 5519

Since the days of the Republic, Texas statutes of limitation affecting real property have provided for disabilities. At present the disabilities are minority (including minority of married women), service in the armed forces during a time of war, unsoundness of

[2] A comparative study of American statutes is made in Taylor, Titles to Land by Adverse Possession, 20 Iowa L. Rev. 551, 738 (1935).

[3] For rules governing disabilities see Hunton v. Nichols, 55 Tex. 217 (1881); Burby, Real Property § 232 (1954); 4 Tiffany, Real Property § 1169 (3d ed. 1939).

[4] Tex. Rev. Civ. Stat. Ann. arts. 5518, 5519 (1958). The statutes are the subject of a comment in 10 Baylor L. Rev. 196 (1958).

[5] Tex. Rev. Civ. Stat. Ann. art. 5519a (1958).

mind, and imprisonment.[6] If one of these disabilities exists at the time a person acquires his cause of action (or defense founded on title) against an adverse possessor, the statute of limitation does not run until the disability ends.

Article 5518 has a proviso which reads as follows:

> [P]rovided, that notwithstanding a person may be or may have been laboring under any of the disabilities mentioned in this article, one having the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying same, shall institute his suit therefor within twenty-five years next after his cause of action shall have accrued and not thereafter.

This is one of the 25-year statutes of limitation referred to earlier.

Article 5684 of the Texas Revised Civil Statutes of 1911 was the predecessor of article 5518 of the current statutes. Article 5684 did not originally have a proviso. In 1919, a proviso was added by legislative enactment.[7] It was worded differently from the present proviso in article 5518.[8] The present language was formulated by the compilers of the 1925 revision of the Texas Statutes. It is not believed that the new wording effected any change in the meaning of the earlier proviso.

The same act that added a proviso to article 5684 also added article 5684a to the 1911 Revised Statutes.[9] Under the latter article a person

[6] Tex. Rev. Civ. Stat. Ann. art. 5518 (1958):

> If a person entitled to sue for the recovery of real property or make any defense founded on the title thereto, be at the time such title shall first descend or the adverse possession commence:
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> 1. A person, including a married woman, under twenty-one years of age, or
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> 2. In time of war, a person in the military or naval service of the United States, or
>
> 3. A person of unsound mind, or
>
> 4. A person imprisoned, the time during which such disability or status shall continue shall not be deemed any portion of the time limited for the commencement of such suit, or the making of such defense; and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title; provided . . . .

The proviso is quoted in the text.

Coverture was a disability until 1895 when the essence of the present wording was enacted. Tex. Acts 1895, ch. 30. Cf. Tex. Rev. Civ. Stat. Ann. art. 5535 (1958), dealing with limitations on personal actions, where the disability of coverture is retained.

[7] Tex. Acts 1919, ch. 55, § 1.

[8] The proviso to article 5684 read:

> [P]roviding that on and after the first day of November, A.D. 1920, the period of limitation shall not be extended so as to authorize any person who has the right of action for the recovery of any lands, tenements, hereditaments to institute suit therefor against another having peaceable and adverse possession thereof, using and enjoying the same after the expiration of twenty-five years next after the cause of action shall have accured [accrued], and provided further that this article shall in no way affect suits pending when this Act takes effect, and all such suits shall be tried and disposed of under the law then in force.

[9] Tex. Acts 1919, ch. 55, § 1.

holding peaceable and adverse possession of land, "the title to which has passed out of the State, using and enjoying the same under deed or deeds duly recorded constituting a regular chain of title, for a period of twenty-five years immediately preceding shall have a good marketable title thereto." The 1919 act was described in its title as amending article 5684 by limiting the time in which a person under disability may sue for the recovery of real estate and by vesting "good marketable title" in a person who has the elements of adverse possession listed in article 5684a.

The compilers of the 1925 Revised Statues changed the wording of article 5684a, which then became article 5519. Under the new wording no person having a right of action for the recovery of land could bring suit against another holding

> by peaceable, adverse claim of right in good faith under a regular chain of title, descending from the State of Texas with all the muniments of such title, duly recorded in the county where the land is situated for a period of twenty-five years prior to the accrual of such cause of action, and one so holding and claiming such lands . . . [was declared] to have a good marketable title thereto.

It is clear that the compilers made substantive changes in the earlier statute. First, they introduced "good faith" as a necessary element of the adverse possessor's claim. Second, it was necessary for the adverse possessor to hold "under a regular chain of title, descending from the State of Texas." Under the original statute the title must have passed out of the State, but no requirement was made that the adverse possessor's chain of title should run back to the sovereign. Third, the time of accrual of the cause of action to recover real property was introduced in an ambiguous way. Ordinarily, if the time of accrual of the cause of action is mentioned in a statute of limitation, the period of adverse possession runs thereafter. But in article 5519 the 25-year period was specified as running prior to the accrual of the cause of action.

The Legislature was not pleased with what the compilers had done. In 1927, it enacted what is now article 5519:[10]

> No person who has a right of action for the recovery of real estate shall be permitted to maintain an action therefor against any person having peaceable and adverse possession of such real estate for a period of twenty-five years prior to the filing of such action, under claim of right, in good faith, under a deed or deeds, or any instrument or instruments purporting to convey the same, which deed or deeds or in-

[10] Tex. Acts 1927, ch. 250, § 1. Section 2 recited that the codifiers of the 1925 Revised Statutes had made material changes in the 25-year statute and had caused uncertainties in land titles, giving rise to an emergency.

strument or instruments purporting to convey the same have been recorded in the deed records of the county in which the real estate or a part thereof is situated; and one so holding and claiming such real estate under such claim of title and possession shall be held to have a good marketable title thereto, and on proof of the above facts shall be held to have established title by limitation to such real estate regardless of coverture, minority, insanity or other disability in the adverse claimant, or any person under whom such adverse claimant claims, existing at the time of the accrual of the cause of action, or at any time thereafter. Such peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them. The adverse possession of any part of such real estate shall extend to and be held to include all of the property described in such deed or instrument conveying or purporting to convey, under which entry was made upon such land or any part thereof, and by instrument purporting to convey shall be meant any instrument in the form of a deed or which contains language showing an intention to convey even though such instrument, for want of proper execution or for other cause is void on its face or in fact.

Certain features of this statute should be noted. It is not specified that the period of adverse possession should run after the cause of action to recover real estate accrues. Rather, it is sufficient if the period has run prior to the filing of the action. The time of accrual of the cause of action is mentioned only to make clear that a disability at this time does not toll the statute. The "claim of right, in good faith" element, introduced by the compilers, has been retained. Unlike its predecessors, the statute relates itself to the preceding article by listing disabilities and declaring that they are no impediment to the vesting of a "good, marketable title" if the elements of 25 years' adverse possession are present.

The appellate courts had occasion in only a few cases to interpret the 25-year statutes as enacted prior to 1927. In *Cauble v. Halbert*[11] the court first held that a defendant could not claim under article 5684a because he did not hold under a deed which described the land. On rehearing the court admitted error in interpreting the defendant's plea and considered whether or not he had a defense in the proviso to article 5684. The defendant argued that the proviso operated regardless of the recordation of a deed covering the land. The court agreed,[12] but the plaintiff's judgment was affirmed because adverse and peaceable possession had not continued for as long as 25 years.

[11] 254 S.W. 407 (Tex. Civ. App. 1923) error dism.

[12] Id. at 409:

"When the act is read as a whole, in the light of its caption, we believe that the proviso quoted from article 5684 should be construed as meaning

In *Easterling v. Murphey*[13] article 5519 as first drafted in the 1925 Revised Statutes was set up by the defendants. The court was of the opinion that until September 5, 1899, the defendants' predecessors' claim to 27 acres of land did not meet statutory requirements because their deeds recognized the title of the plaintiffs' predecessor. The court said:

> As we understand the 25-year statute of limitation (article 5519), its purpose was, where one holds lands by peaceable, adverse claim of right in good faith under a *regular* chain of title, with all the muniments of such title duly recorded, for a period of 25 years, such party shall be deemed to have good title, regardless of the undisclosed right of minors, married women, and all others under such disabilities, and against whom our 3, 5, and 10 years' statutes would not run.[14]

Because no "regular chain of title" to the acreage in question was shown, the defendants "could not claim in good faith to own the 27 acres."[15]

Howth v. Farrar[16] is a curiosity in that the action was brought in or after 1930 and the court quoted and discussed article 5519 as it first appeared in the 1925 Revised Statutes rather than as amended in 1927. On a showing of absolute claim to land for some 50 years, the defendants were held to have acquired title under the 10-year statute of limitation.[17] The court stated that article 5518 added nothing to the defendants' position, since adverse possession for 25 years "is effective as well against those, as against those not, under disabilities."[18] Article 5519 was treated as a separate 25-year statute, the requirements of which had not been met. Proof was lacking that deeds in the defendants' chains of title were recorded. Comment was made that the statute was not worded so as to make the accrual of action the starting point of the period of adverse and peaceable possession.

It is obvious that from the beginning article 5519 and the proviso to article 5518 have been closely related. Nevertheless, it may be

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> that in no event can one laboring under any of the disabilities mentioned recover title to land of another who has held peaceable and adverse possession using and enjoying the same for a period of 25 years, however long such disability may have continued next after the cause of action accrued."

[13] 11 S.W.2d 329 (Tex. Civ. App. 1928) error ref.

[14] Id. at 332.

[15] Easterling v. Murphey, 11 S.W.2d 329, 332 (Tex. Civ. App. 1928) error ref. The court went on to say that if a regular chain of title was made out after September 5, 1899 (in the recorded deeds that purported to convey the land), the 25-year period of limitation had not run. A federal statute, Barnes' U.S. Code (1919) §§ 10313, 10322, 10347, caused the period not to run while plaintiffs' immediate predecessor in title served in the Navy during World War I.

[16] 94 F.2d 654 (5th Cir.), cert. denied, 305 U.S. 599 (1938).

[17] Tex. Rev. Civ. Stat. Ann. art. 5510 (1958).

[18] Howth v. Farrar, 94 F.2d 654, 659 (5th Cir.), cert. denied, 305 U.S. 599 (1938).

asserted that, on analysis, they mean somewhat different things. When article 5684 of the 1911 Revised Statutes was amended in 1919, the proviso said in effect that disabilities should not prevent a person from acquiring title to land under the 3, 5, and 10-year statutes of limitation[19] if adverse and peaceable possession has been maintained for 25 years after the cause of action accrued. The proviso to article 5518 says the same thing now.

Article 5684a of the 1911 Statutes, enacted at the same time as the proviso to article 5684, declared that an adverse possessor holding for 25 years under recorded deeds constituting a regular chain of title acquired a good, marketable title to land. No doubt the proviso to article 5684 operated in this situation to prevent disabilities from tolling the operation of article 5684a, which did not mention disabilities. But the latter article specified new elements of adverse possession which were not in the proviso to article 5684. The compilers of the 1925 Revised Statutes changed article 5684a and renumbered it as article 5519, and in 1927 the Legislature modified what the compilers had done. Through the changes article 5519 has retained elements of adverse possession which are not found in the proviso to article 5518. One is warranted in concluding that article 5519 is a statute of limitation having an operation of its own. This is true even though it is difficult to conceive of a case in which a person may acquire title under article 5519 and not acquire it under the proviso to article 5518.

The *Howth* and *Cauble* cases definitely recognize that article 5519 and the proviso to article 5518 have separate and different operations. Language in the *Easterling* decision seems to amalgamate them, but this is not entirely clear.

III. Case Law Under Articles 5518 and 5519

A. *Nature Of Barred Cause Of Action*

The leading decision on the difference between a suit to recover land and a suit to cancel a deed and the application of the various statutes of limitation is *Deaton v. Rush*.[20] The plaintiff, a married woman, was induced by fraudulent representations to convey separate real property to the defendant. The jury found that the plaintiff and her husband should have learned of the misrepresentations in 1911. The plaintiff sued in 1919 to rescind the deed and to recover the land. The defendants pleaded the 4 and 5-year statutes of limita-

[19] Tex. Rev. Civ. Stat. Ann. arts. 5507-10 (1958).
[20] 113 Tex. 176, 252 S.W. 1025 (1923).

tion[21] and won in the trial court. The court of civil appeals reversed and remanded for a determination of damages suffered by the plaintiff. On petition for rehearing questions were certified to the supreme court.

Question 4 was whether the plaintiff could maintain an action to recover the land before her deed was canceled, and the answer was "No." An action to recover land "has reference to . . . possession. . . . [It] has a well known and definite signification, and means an action for ejectment, trespass to try title, or a suit to recover the land itself."[22] The defendant's deed was voidable, not void, and until it was canceled he had title and right of possession.

Question 3 was whether the plaintiff's cause of action for recovery of the land accrued prior to cancellation of the deed, and the answer was "No."

> Until such cancellation there could be no such "mature right to recover the land as might have been declared upon and maintained subject only to such valid defenses by which it might have been defeated." The deed to Rush itself was a complete answer to any suit for the recovery of the land, irrespective of its voidability, until its power for that purpose had been destroyed by the inquiry into and establishment of the rights of Mrs. Deaton arising out of the fraud by which the deed was obtained.[23]

Question 5 was whether the defendant's peaceable and adverse possession under the 5-year statute barred the plaintiff's suit to cancel the defendant's deed, and again the answer was "No." The 5-year statute bars suits to recover land, and the plaintiff's action was not that type of suit. The plaintiff's action was a personal one to cancel a deed, and recovery of land was only incidental to and followed after the main relief of cancellation. The 4-year statute of limitation was applicable to the personal action, and it had not run because of the plaintiff's disability of coverture.[24] The court emphasized that title is gained under the 5-year statute only by peaceable and adverse possession taking place after the cause of action for recovery of the land accrues.

Deaton v. Rush said nothing about the 25-year statutes because

[21] Tex. Rev. Civ. Stat. Ann. art. 5509 (1958) bars suit to recover real estate against a peaceable and adverse possessor who pays taxes and claims under a deed or deeds duly registered for a period of five years after the cause of action accrues.

Tex. Rev. Civ. Stat. Ann. art. 5529 (1958) declares that any action other than one for real estate for which no limitation is otherwise prescribed must be brought within four years after it accerues.

[22] Deaton v. Rush, 113 Tex. 176, 192, 252 S.W. 1025, 1030 (1923), quoting from Martin v. Burr, 111 Tex. 57, 228 S.W. 543 (1921).

[23] 113 Tex. at 194, 252 S.W. at 1031.

[24] The statutes of limitation affecting personal actions include coverture as a disability during which the limitation periods do not run. See note 6 supra.

the suit was commenced before they were enacted. Further, no period of adverse possession approaching 25 years was involved. But the obvious question arises whether the reasoning of the case is applicable to the 25-year statutes.

Free v. Owen[25] may supply the answer to the question and is the leading decision interpreting article 5519. In 1896, Owen, a married woman, executed and delivered a deed to Bowden covering 50 acres of land. The deed was recorded in March, 1901. Owen was insane at the time of the delivery of her deed and continued so until her death in 1917. Bowden went into possession of the land, died, and was succeeded by his heirs. In 1913, Bowden's heirs conveyed to Fenton, who conveyed to the defendant Free in 1917. The plaintiffs, heirs of Owen, brought suit in 1933 to cancel Owen's deed and to gain possession of the land. Among the plaintiffs was a daughter of Owen who had been insane since 1915. The defendants set up adverse possession under article 5519.

The Texas Supreme Court regarded Owen's deed to Bowden as voidable, not void. Was the suit to cancel Owen's deed an "action for the recovery of real estate" as the expression is used in article 5519? One would think not under the trenchant reasoning of *Deaton v. Rush*. But the court found reasons for interpreting the expression more broadly. The court said:

> The paramount purpose of the statute is to render indefeasible the title of a limitation claimant whose claim satisfies the requirements of the statute. . . . [Here is quoted the portion of the statute stating that one holding under its terms shall have good marketable title regardless of the existence of disabilities.] It thus reasonably appears that the term "right of action for the recovery of real estate", as used in this statute, comprehends an action of any character where the relief sought, if granted, would have the effect to dispossess the defendant of land or to invest the complainant with title to land, including the incidental right of possession. In this respect the statute looks to the inception and essential character of the right which lies at the foundation of the claim asserted in the action, rather than to the particular form or character of the relief sought. For example, where the claim asserted involves the rescission of a deed which has been executed by a minor or an insane person, the statute contemplates the right of rescission as the essential basis of the action, and regards such right to rescind as having accrued contemporaneously with the execution of said deed. We conclude, therefore, that the right or cause of action for the cancellation of the deed from Mrs. M. C. Owen to Bowden comes within the meaning of the statute, and that the statute contemplates

[25] 131 Tex. 281, 113 S.W.2d 1221 (1938), reversing 85 S.W.2d 1090 (Tex. Civ. App. 1935). The decision of the court of civil appeals is noted in 14 Texas L. Rev. 269 (1936).

such right or cause of action as having accrued at the time said deed was executed.[26]

Accordingly, the defendants' judgment in the trial court was affirmed.

The defendants did not plead the 4-year statute of limitation. It is not apparent from the opinions in the case why this was so.[27] This circumstance, however, does not weaken the decision in any respect. The statute was not in the case, and the supreme court opinion rests squarely on article 5519, making it available as a defense to an action to cancel a deed on the ground of the grantor's disability.[28]

Suppose that a grantor not laboring under a disability is induced by fraud, duress, or mistake to execute and deliver a deed.[29] Does article 5519 have application to such a case? If it does, should the 25-year period run from the date of delivery of the deed or the date on which the grantor learns or ought prudently to have learned of the wrong done him? The statute speaks of passing a good marketable title "regardless of coverture, minority, insanity or other disability," and the implication may be that victims of fraud, duress, or mistake are not affected. On the other hand, *Free v. Owen* manifests full acceptance of the policy of the statute and broad interpretation of its language. The " 'right of action for the recovery of real estate,' as used in this statute, comprehends an action of any character where the relief sought, if granted, would have the effect to dispossess the defendant of land or to invest the complainant with title to land, including the incidental right of possession."[30] Owen's cause of action was regarded as having accrued when the deed was executed, and it is not difficult to analogize and to say that the same thing occurs (under article 5519) when a deed is induced by fraud, duress, or mistake.

Authorities on the question whether article 5519 bars a suit for rescission of a deed induced by fraud, duress, or mistake are meager. Two decisions, one of them by a federal district court, hold that the statute is a bar, but other grounds supported the judgments.[31] In

[26] 131 Tex. at 284, 285, 113 S.W.2d at 1224.

[27] Disabilities in Owen's heirs could not be tacked after her death. Tex. Rev. Civ. Stat. Ann. art. 5544 (1958).

[28] The court of appeals stated that "appellants' action to recover the land was not barred by the three, five or ten year statutes of limitation . . . at the time this suit was filed to cancel the deed and to recover the land," citing Deaton v. Rush. Owen v. Free, 85 S.W.2d 1090, 1092 (Tex. Civ. App. 1935), rev'd, 131 Tex. 281, 113 S.W.2d 1221 (1938).

[29] The case supposed is different from Deaton v. Rush in that plaintiff Deaton was under the disability of coverture.

[30] See quotation in text at note 26 supra.

[31] Gonzales v. Yturria Land & Livestock Co., 72 F. Supp. 280, 282 (S.D. Tex. 1947) (fraud); Wilhite v. Davis, 298 S.W.2d 928 (Tex. Civ. App. 1957) (same). A headnote to Cartwright v. Minton, 318 S.W.2d 449 (Tex. Civ. App. 1958) error ref. n.r.e., indicates to the contrary, but the case cannot be said to decide the point.

McCook v. Amarada Petroleum Corp.[32] the plaintiffs sued to nullify a partition decree, and the court made an interesting distinction:

> If the appellants [plaintiffs] had been parties to the partition decree . . . and they were not served with citation or other grounds existed for setting the decree aside, under the authorities the four years' statute would apply for the reason that the judgment would be binding upon appellants until it was set aside and appellants would have no right of action to recover the land until such judgment was annulled. Not having a right of action to recover the land, the statute of limitation with respect to actions for the recovery of real estate would not apply for such statutes can only run against one having a right of action to recover land. . . .[33]
>
> The situation is different, however, when the parties seeking to annul a decree, as here, are not parties or privies to it. In such a case the decree sought to be annulled is in no way binding upon them and they have at all times, so far as the partition decree is concerned, a right of action to recover the land, and having a right of action to recover it, the appellees were entitled to plead in this suit the 5, 10, and 25 years' statutes of limitation applicable to such actions to defeat appellants' title. . . .[34]

The flavor of the opinion is that article 5519 does not bar any action to annul a deed or judgment which is voidable because of fraud, duress, or mistake. It should be noted, however, that the case was decided before *Free v. Owen*. One may well argue that article 5519 should be interpreted broadly to bar suits for annulment of voidable instruments where the ultimate object is to recover land.

A different problem arises where the 25-year statutes are set up against a remainderman. In general, a life tenant does not hold adversely to a remainderman, and where an adverse claimant enters during a life tenancy, taking under the life tenant, no cause of action accrues in the remainderman's favor until the life tenancy ends.[35] The 3, 5, and 10-year statutes in Texas specify that the periods of limitation do not run until the cause of action to recover land accrues. Therefore, these statutes do not operate against a remainderman,

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[32] 93 S.W.2d 482 (Tex. Civ. App. 1936) error dism.

[33] Citing Deaton v. Rush and Garza v. Kenedy, 299 S.W. 231 (Tex. Comm. App. 1927).

[34] McCook v. Amarada Petroleum Corp., 93 S.W.2d 482, 484 (Tex. Civ. App. 1936) error dism.

[35] 2 Restatement, Property §§ 222-24 (1936); 2 Thompson, Real Property § 797 (perm. ed. 1939); 4 Thompson, Real Property § 2662 (perm. ed. 1939); 4 Tiffany, Real Property § 1184 (3d ed. 1939).

To be distinguished is the situation where an adverse claimant enters land before the life estate and remainder are created. An owner of land cannot defeat or reduce the title matured by an adverse claimant by creating life and remainder estates after he enters. 2 Restatement, Property § 226 (1936).

absent unusual acts and circumstances, before the life estate ends.[36] Nor does the proviso to article 5518 help the adverse claimant, since the barring of suit occurs under its terms only when 25 years have elapsed after the cause of action accrues.

Article 5519 bars suit if peaceable and adverse possession (along with other requirements) is maintained for 25 years "prior to the filing of . . . action." Despite this difference of language it is clear that a remainderman is barred from claiming land only if the adverse possession is continued for 25 years after he becomes entitled to possession.[37] In *Pool v. Sneed*,[38] after referring to the general rule that a statute of limitation runs only after a cause of action accrues, the court said:

> We can conceive of no good reason why this general rule should not apply to the twenty-five-year statute as well as to all others. It is elementary, we think, that statutes of limitation generally, as applicable to an interest in land which one owns as a remainderman subject to the life estate in another, do not begin to run in favor of one in possession, or of any persons not strangers to the life estate, until the death of the life tenant.

The reliance of the court on the general rule may be unduly broad in view of the avoidance of language in article 5519 requiring adverse possession after the accrual of the cause of action. But the reliance is correct if it is understood that the "cause of action" spoken of includes any cause of action the ultimate objective of which is to recover land. At any rate, one is not disposed to disagree that a statute of limitation should not run against a remainderman until the termination of the preceding life estate. The reason is that, in the absence of unusual circumstances, the claimant's occupation is not adverse to the remainderman until he is entitled to possession.

Howth v. Farrar,[39] earlier commented upon, is a case in which a remainderman was held barred from claiming land by the 10-year statute of limitation. Recordation requirements of article 5519 were not met, but the court was moved to remark that the article did not

[36] Millican v. McNeill, 102 Tex. 189, 114 S.W. 106 (1908); Evans v. Graves, 166 S.W.2d 955 (Tex. Civ. App. 1942) error ref. w.o.m.; see cases cited in 2 Tex. Jur. 2d Adverse Possession §§ 24-26, 49 (1959).

[37] Brown v. Wood, 239 S.W.2d 195 (Tex. Civ. App. 1951) error ref.; Bryson v. Connecticut Gen. Life Ins. Co., 211 S.W.2d 304, 308 (Tex. Civ. App. 1948), rev'd on other grounds, 148 Tex. 86, 219 S.W.2d 799 (1949), earlier proceedings, 196 S.W.2d 532 (Tex. Civ. App. 1946); Pool v. Sneed, 173 S.W.2d 768 (Tex. Civ. App. 1943) error ref. w.o.m.; Evans v. Graves, 166 S.W.2d 955 (Tex. Civ. App. 1942) error ref. w.o.m.

[38] 173 S.W.2d 768, 780 (Tex. Civ. App. 1943) error ref. w.o.m.

[39] 94 F.2d 654 (5th Cir.), cert. denied, 305 U.S. 599 (1938), see note 16 supra.

require 25 years of adverse possession after a cause of action accrued.[40] *Howth v. Farrar* is an unusual case in that possession by fee claimants holding under a life tenant for some 50 years during his life was held peaceable and adverse to the remainderman and sufficient to mature title.[41]

Severance of land into surface and subsurface estates gives rise to problems in the application of statutes of limitation which are similar to those arising when ownership of land is divided into life and remainder estates. In general, where a grantor excepts or reserves a mineral estate or oil and gas underlying land, the grantee and others holding under him do not gain an absolute fee simple by peaceful and adverse possession of the surface.[42] This is true under article 5519.[43] A substantial physical entrance into the subsurface and user inconsistent with the grantor's right are necessary before the statute will run. The reason is that the subsurface is regarded as severed from the surface, and occupation of the latter is not adverse possession of the former and gives rise to no cause of action.

B. *Elements Of Adverse Possession Under Article 5519*

The several elements which together bar a suit for real estate under article 5519 may be itemized as follows: There must be (1) "peaceable and adverse possession," (2) for 25 years, (3) "under a claim of right, in good faith," (4) "under a deed or deeds, or any instrument or instruments purporting to convey the same," (5) "which deed or deeds or instruments . . . have been recorded in the deed records of the county" where the land lies. Item (2) is of difficulty only in the determination of the beginning of the 25-year period, and this has already been discussed.

The significance of item (4) is that an occupant of land cannot

[40] Id. at 660:

> For while all the other statutes of limitations require the suit to be instituted within the period named next after the cause of action accrues, and as to them, it might be argued that the cause of action did not accrue until the death of the life tenant, this statute does not so limit the effect of the possession. It prevents any person who has a right of action from maintaining it against one having the peaceable and adverse possession it prescribes, without regard to when the cause of action accrued.

[41] Disagreement with the case is expressed in Evans v. Graves, 166 S.W.2d 955 (Tex. Civ. App. 1942) error ref. w.o.m. and Pool v. Sneed, 173 S.W.2d 768 (Tex. Civ. App. 1943) error ref. w.o.m.

[42] Cases are cited and discussed in 2 Tex. Jur. 2d Adverse Possession § 59 (1959).

[43] Adams v. Duncan, 147 Tex. 332, 215 S.W.2d 599 (1948), affirming 210 S.W.2d 180 (Tex. Civ. App. 1948); West v. Hapgood, 141 Tex. 576, 174 S.W.2d 963 (1943), affirming 169 S.W.2d 204 (Tex. Civ. App. 1943). In accord are cases decided under Tex. Rev. Civ. Stat. Ann. art. 5519a (1958), cited infra note 78. In Peterson v. Holland, 189 S.W.2d 94, 100 (Tex. Civ. App. 1945) error ref., an oil and gas lease from the owner of land was held to sever the mineral estate so that subsequent adverse possession of the surface did not affect it.

assert ownership under article 5519 unless he claims under a writing which purports to convey. The last sentence of article 5519 defines an "instrument purporting to convey" as "any instrument in the form of a deed or which contains language showing an intention to convey even though such instrument, for want of proper execution or for other cause is void on its face or in fact." The sentence also says that adverse possession of part of the land "shall extend to and be held to include all of the property described in such deed or instrument . . . under which entry was made." An obvious implication of this language is that adverse possession under the statute does not extend to or include property not described. In other words, no greater estate or interest can be claimed under article 5519 than is defined in the writing. An instrument which at most grants a license or an easement cannot support a fee simple claim.[44] A deed which excepts a mineral estate is of no avail to the grantee if he later asserts title to the minerals.[45] Indeed, even if he takes a deed of release of the minerals but the grantor has no title to convey, occupation of the surface of the land will not mature title to the minerals.[46] A conveyance which excepts minerals accomplishes severance of the mineral estate, and adverse possession does not take place without entrance into and user of the minerals.

Uncertain or ambiguous language is not uncommon in deeds, and occasionally a court must apply principles of construction in determining how much land or what estate can be claimed. *Pinchback v. Hockless*[47] is an example of the interpretation of a deed to convey 90 acres and not to include an additional 10 acres claimed under article 5519. In *Davenport v. Bass*[48] the northern boundary of "porciones 86 and 87" was determined as a factual matter, and the grantee of the

[44] Peterson v. Holland, supra note 43, at 97: "One of the prerequisites of maturing title under the twenty-five year statute of limitation is that the holding must be under an instrument in writing purporting to convey the title." In Pewitt v. Renwar Oil Corp., 261 S.W.2d 904 (Tex. Civ. App. 1953) error ref. n.r.e., a deed was construed to grant a fee simple rather than an easement and was held sufficient for title to mature under the article.

[45] Adams v. Duncan, 147 Tex. 332, 215 S.W.2d 599 (1948), affirming 210 S.W.2d 180 (Tex. Civ. App. 1948); West v. Hapgood, 141 Tex. 576, 174 S.W.2d 963 (1943), affirming 169 S.W.2d 204 (Tex. Civ. App. 1943). A grantor of a mineral estate severs it so that he cannot thereafter claim it under article 5519 without receiving a new deed to the minerals and entering and using them. King v. Hester, 200 F.2d 807, 815 (5th Cir. 1952).

[46] West v. Hapgood, supra note 45.

[47] 138 Tex. 306, 158 S.W.2d 997 (1942), reversing 137 S.W.2d 864 (Tex. Civ. App. 1940).

[48] 137 Tex. 248, 153 S.W.2d 471 (1941), reversing 127 S.W.2d 1022 (Tex. Civ. App. 1939). In Easterling v. Murphey, 11 S.W.2d 329 (Tex. Civ. App. 1928) error ref., deeds purporting to convey an undivided one-half of a tract of land were held insufficient to support a claim of the whole title under article 5519 as it was originally worded in the 1925 Revised Statutes. Also see Cauble v. Halbert, 254 S.W. 407, 408 (Tex. Civ. App. 1923) error dism. (Article 5684a construed).

"porciones" could not claim under article 5519 beyond the terms of his deed.

A written conveyance is sufficient under the statute even though "for want of proper execution or for other cause [it] is void on its face or in fact." This is a strong statement, and one may wonder how far the courts will adhere to its literal terms. *Unsell v. Federal Land Bank*[49] shows an unwillingness to regard an undelivered instrument as sufficient under article 5519. In 1910, Unsell executed an instrument conveying land to his second wife. The instrument was acknowledged but not delivered, and Unsell expressly reserved the right during his life to change it and to control and dispose of the property. Unsell's wife did not learn of the instrument until after his death in 1911. She got possession of the deed and recorded it in the same year. In 1922, she executed and delivered a deed of trust to secure a promissory note. In 1928, the plaintiff, Unsell's son, became of age, and in 1936 he sued in trespass to try title, claiming as an heir of his father. His mother and the holder of the deed of trust pleaded article 5519 and had judgment in the trial court. On appeal the judgment was reversed and the plaintiff recovered the land.

An entirely sufficient ground for the decision was that the instrument under which the defendants claimed was no conveyance at all. Nothing was conveyed because Unsell reserved during his life the power to change the instrument and to control and dispose of the property. The court stated that the instrument was "purely testamentary" and did not purport to convey land as required by article 5519.[50]

Another ground for the decision was that the instrument was never delivered. The court said:

> In total absence, as here, of any facts or circumstances which would tend to raise the issue of estoppel the conduct of a person named therein as grantee in procuring possession of an undelivered deed and claiming title under it is in law condemned as more than a mere fraud. It is spoken of in decisions as being comparable to forgery, and is condemned to the extent that his vendee, for value and without notice, is not protected as an innocent purchaser.[51]

The court went on to comment on the grantee's "good faith" under article 5519:

> By like reasoning we think that the acts of one named as grantee in a deed not intended to be delivered who takes it from among the private

[49] 138 S.W.2d 305 (Tex. Civ. App. 1940) error dism. by agr.
[50] Id. at 308, 309.
[51] Unsell v. Federal Land Bank, 138 S.W.2d 305, 309 (Tex. Civ. App. 1940) error dism. by agr.

> papers of the deceased maker, records it, and claims title under it, would discolor such claim to the extent that as a matter of law it must be held not made "in good faith" within the meaning of those words as used in the statute.[52]

The *Unsell* opinion is of little aid in predicting what kinds of void conveyances will be sufficient for adverse possessors to claim under article 5519. One may guess that the instrument must have been voluntarily parted with or entrusted to the grantee. Probably it must not have been forged. With these qualifications, a void instrument, actually executed by the person who appears to be the maker, is sufficient if it purports to convey.

A special situation in which an adverse occupant in a chain of title may not assert that he holds under a deed is presented in *Epps v. Finehout.*[53] Epps was assumed to have title to the land in question by or through a recorded deed. He conveyed to Pope, through whom the plaintiff derived title. The defendants, heirs of Epps, claimed the land by adverse possession. It was held that neither the 5 nor 25-year statute of limitation was available as a defense. With respect to article 5519 the court said, "[W]e do not believe that one claiming as an heir against those holding under an ancestor's deed can be considered as holding 'under claim of right, in good faith, under a deed or deeds . . . purporting to convey' the property claimed."[54] Undoubtedly Epps himself could not have asserted title under the 5 or 25-year statute.

Both the *Epps* and *Unsell* opinions touch upon item (3) of the elements which together bar suit for real estate under article 5519. Of course, a legislature may choose to condition the maturing of title under a statute of limitation on the existence of "good faith" in making a claim of right. But the requirement is anomalous and, if broadly adhered to, materially limits the operation of the statute. No doubt in many cases the facts and law are so uncertain that the adverse possessor and his successors are properly regarded as making a claim of right in good faith. But in a substantial number of cases this cannot be said, and the adverse possessor and his successors are in the attitude of willful trespassers.

It is hard to argue that the expression, "in good faith," should be held for naught. Lack of mention of good faith in the proviso to

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[52] Ibid.

[53] 189 S.W.2d 631 (Tex. Civ. App. 1945) error ref. w.o.m.

[54] Id. at 632. Cf. Walton v. Stinson, 140 S.W.2d 497 (Tex. Civ. App. 1940) error ref., in which the plaintiffs got title under a sheriff's deed, and the foreclosure defendant remained in possession of the land. The court stated that the statutes of limitation began running on the date of the sheriff's deed but had no occasion to consider whether defendants should be regarded as holding under a recorded deed.

article 5518 lends emphasis to the phrase in article 5519. On the other hand, willful trespassers are within the policy of repose. If article 5519 is catch-all legislation, a willful trespasser should be able to mature title.

Little has been said in the cases to explain the "good faith" requirement.[55] The dearth of discussion leads one to believe that the phrase has an attenuated meaning. The *Unsell* decision related lack of good faith to conduct whereby a grantee obtained a deed without the grantor's consent—conduct which was compared with theft and forgery. Perhaps good faith is little more than seriousness in asserting a claim of right, so long as the adverse possessor has not procured an involuntary or unconscious parting with a deed.

Article 5519 recognizes that there can be tacking of adverse possession. The second sentence states, "Such peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them." The fifth enumerated requirement to mature title under the article is recordation in the county where the land lies of the "deed or deeds or instrument or instruments" under which the adverse possessor claims. The singular and plural specifications would seem to indicate that every deed under which an adverse occupant claims through the necessary 25-year period must be recorded.

But the Texas Supreme Court has ruled to the contrary, and it is sufficient if only the first deed in the 25-year period be recorded. In *Free v. Owen*[56] the first deed from Owen to Bowden was executed in 1896 and recorded in 1901. Bowden's heirs conveyed the land to Fenton in 1913, and Fenton conveyed to Free in 1917. Findings were made that Fenton's and Free's deeds "were not put of record within a reasonable time after they were executed." Nevertheless, it was held that recordation of Bowden's deed in 1901 satisfied article 5519. The court declared:

> It fairly appears from the language of the statute that the recording of this deed inured to the benefit of the successors of Bowden who stood in privity of estate with him. . . . [Reference is here made to the second sentence of article 5519.] A careful reading of these provisions, in connection with other preceding provisions, convinces us that the recording of a deed or instrument which purports to convey the land, under which deed or instrument entry on the land originally occurs and the period of adverse possession prescribed by the statute commences, satisfies the statute so far as the matter of recording is concerned. Regardless of whether such recorded deed or instrument

[55] Wilhite v. Davis, 298 S.W.2d 928, 934 (Tex. Civ. App. 1957), barely mentions it.
[56] 131 Tex. 281, 113 S.W.2d 1221 (1938), see note 25 supra.

> be void or voidable, or does or does not actually effect a conveyance of the land, the continuity of the adverse possession begun under such recorded deed or instrument is not interrupted by a failure to record deeds to succeeding holders of such possession in privity with the original holder. In a word, where such adverse possession is continued in different persons successively, the required privity of estate existing, such possession is to be regarded as held by each of them under such recorded deed or instrument within the meaning of the statute. In this connection, we do not mean to imply that the term "privity of estate" as used in the statute means anything more than privity of possession, in view of the already established meaning of that term, as used in our limitation statutes. . . .[57]

The conclusion reached in *Free v. Owen* is thought to be desirable even though one may hesitate about the construction of statutory language. If recordation of each successive deed were required, troublesome questions would arise as to whether they were recorded in a reasonably prompt time. How much notice is given by recordation of deeds after the one under which adverse possession is first taken is a matter of doubt. Insistence on such recording would reduce the effectiveness of article 5519 as catch-all legislation and would attach undue importance to a circumstance which is secondary to the physical fact of peaceable and adverse possession.

The first itemized requirement of article 5519 is "peaceable and adverse possession," and no decision indicates that the expression has any different meaning from that which it has in the other statutes of limitation. Entry must be made on the land, and occupation or substantial user in a manner appropriate to the character of the land must take place continuously over a 25-year period in an open and hostile way. If such entry and occupation or user are not proved, the claim of title falls.[58] The acts of entry and occupation or user need not be done on all portions of the land, since the statute says that adverse possession on any part "shall extend to and be held to include all of the property described in such deed or instrument . . . under which entry was made."[59]

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[57] 131 Tex. at 285, 286, 113 S.W.2d at 1224. Accord, Allison v. California Petroleum Corp. of Venezuela, 158 S.W.2d 597 (Tex. Civ. App. 1941) error ref. w.o.m.

[58] Adams v. Duncan, 147 Tex. 332, 215 S.W.2d 599 (1948), affirming 210 S.W.2d 180 (Tex. Civ. App. 1948) (entry upon severed mineral estate necessary for statute to run); West v. Hapgood, 141 Tex. 576, 174 S.W.2d 963 (1943), affirming 169 S.W.2d 204 (Tex. Civ. App. 1943) (same); James v. Hitchcock, 309 S.W.2d 909 (Tex. Civ. App. 1958) error ref. n.r.e.; Williams v. Ballard, 256 S.W.2d 978 (Tex. Civ. App. 1953); Cauble v. Halbert, 254 S.W. 407 (Tex. Civ. App. 1923) error dism. (interpretation of proviso to article 5518).

[59] See Caver v. Liverman, 143 Tex. 359, 185 S.W.2d 417 (1945), affirming 180 S.W.2d 448 (Tex. Civ. App. 1944); Allison v. California Petroleum Corp. of Venezuela, 158 S.W.2d 597 (Tex. Civ. App. 1941) error ref. w.o.m.

C. *Miscellaneous*

Article 5538 of the 1925 Revised Statutes declares: "In case of the death of any person against whom or in whose favor there may be a cause of action, the law of limitation shall cease to run against such cause of action until twelve months after such death. . . ." If an executor or administrator of the estate is appointed before the year expires, the statute runs again from the time of his qualification. In *Allison v. California Petroleum Corp. of Venezuela*,[60] the plaintiffs' ancestor died several years after adverse possession had begun against him. A question for the court, among others, was whether the jury should have been instructed not to count the 12 months following the ancestor's death as part of the 25-year limitation period. The court said not[61] and on this point seems to have fallen into error. Reliance was placed on a line of cases which correctly hold that disability of an heir (*e.g.*, minority, insanity) does not toll a statute of limitation where it has already started running against the ancestor.[62] Article 5538 does not deal with disabilities of the type enumerated in article 5518. When a person dies, a variety of circumstances may cause uncertainty and delay in the bringing of suits on his rights of action. Article 5538 makes allowance for such delay up to a year and plainly states that the limitation law should not run during the period.[63] If the article had no application in the *Allison* case, it is difficult to understand when it would ever operate.

An adverse occupant who meets the requirements of article 5519 is declared to have "a good marketable title." Does this mean that a purchaser who contracts to buy land if an abstract is furnished showing "marketable title" must perform if the abstract shows that seller has title by virtue of adverse possession under the statute? *Owens v. Jackson*[64] is unequivocal in giving a negative answer. The case involved a contract for the purchase of an oil and gas lease on

[60] Supra note 59.

[61] "If limitation began to run against D. P. Allison [ancestor] in 1910 (if not earlier), as found in response to issues 7, 8 and 9, the deaths of Allison and Zella Collins [an heir] alone would not break the running of the statutes of limitation here involved." Allison v. California Petroleum Corp. of Venezuela, 158 S.W.2d 597, 600 (Tex. Civ. App. 1941) error ref. w.o.m.

[62] The court cited Moody's Heirs v. Moeller, 72 Tex. 635, 10 S.W. 727 (1889) and Huling v. Moore, 194 S.W. 188 (Tex. Civ. App. 1917) error ref. The latter case cites, besides the Moeller decision, Johnson v. Schumacher, 72 Tex. 334, 12 S.W. 207 (1888); Howard v. Stubblefield, 79 Tex. 1, 14 S.W. 1044 (1890); and Harris v. Wells, 85 Tex. 312, 20 S.W. 68 (1892).

[63] Cases applying the statute to real property actions are cited in 2 Tex. Jur. 2d Adverse Possession § 9 (1959).

[64] 35 S.W.2d 186 (Tex. Civ. App. 1931) error dism. Accord, Alexander v. Glasscock, 271 S.W.2d 333 (Tex. Civ. App. 1954).

the tender of an abstract showing "merchantable title." The court treated the expression as the same as "marketable title" and stated:

> Marketable title is not dependent upon whether the purchaser, if sued, could successfully defend such title against those suing. If the record of his title as shown by the abstract discloses such outstanding interests in other parties than his vendor, as would reasonably subject him to litigation, or compel him to resort to evidence in parol, not afforded by the record, to defend his title against such outstanding claims, it is not marketable. There is no denial that the record in the instant case disclosed an outstanding interest in J. C. Strickland. But appellees insist that the record clearly discloses that, if Strickland ever had any interest, it was shown to have been barred by limitation. It had been repeatedly held, however, that a limitation title based upon adverse possession is not a marketable title. . . .[65]

The court was of the opinion that article 5519 was "merely an extension and expansion of the limitation statutes as applied to suits to recover lands."[66] The statute did not change the contractual concept of "merchantable" or "marketable" title. The decision is undoubtedly correct. It is one thing to say (as the statute does) that in a suit for land an adverse claimant who satisfies certain requirements matures "good marketable title" and another to say that a purchaser must accept such title before it has been established as valid in a judicial proceeding.

Another word should be said about the relationship between article 5519 and the proviso to article 5518. The special elements of article 5519 and the many cases treating them demonstrate that the article has an operation independent of the proviso. *Free v. Owen* is a case in which article 5519 barred an equitable suit, the ultimate purpose of which was to recover land, where the 3, 5, and 10-year statutes did not do so. *Free v. Owen* may represent a broad principle that any suit to rescind a voidable deed is subject to the limitation of article 5519. The proviso to article 5518, operating in conjunction with the 3, 5, or 10-year statute of limitation, bars "suit to recover real estate" in the traditional sense of the expression but not suits to rescind deeds. If it bars suits for cancellation after 25 years at all, it does so only in conjunction with article 5519.

It is believed that the proviso to article 5518 allows an adverse possessor to gain title to land in certain situations where he would not do so under article 5519. The proviso says nothing about claiming in good faith under a recorded deed. Thus, it clearly appears that an occupant of land who has no deed but who maintains peaceable and

[65] Id. at 187, 188.
[66] 35 S.W.2d 186, 188 (Tex. Civ. App. 1931).

adverse possession for 25 years acquires title under the proviso and the 10-year statute, even though the true owner was under legal disability when his cause of action arose and has remained so ever since. Peculiarly, no case of this kind has been found in the reports. One would think that in the 40-year life of the statute a case would have been decided in which an adverse possessor gains title under the 3, 5, or 10-year statute, with the proviso operating to eliminate a disability 25 years after the cause of action accrued. Perhaps instances of this type have been buried in the large group of cases in which an adverse possessor gets judgment on findings of compliance with all or several of the statutes of limitation and the reviewing court affirms with a general statement or a limited rationale.

IV. Article 5519a: History and Case Law

Section 1 of article 5519a of the current Texas Revised Statutes reads:

> In all suits involving the title to land not claimed by the State, if it be shown that those holding the apparent record title thereto have not exercised dominion over such land or have not paid taxes thereon, one or more years during the period of twenty-five years next preceding the filing of such suit and during such period the opposing parties and those whose estate they own are shown to have openly exercised dominion over and asserted claim to same and have paid taxes thereon annually before becoming delinquent for as many as twenty-five years during such period, such facts shall constitute prima facie proof that title thereto had passed to such persons so exercising dominion over, claiming and paying taxes thereon.

Section 2 declares that the article shall not affect any statute of limitation "or the right to prove title by circumstantial evidence under the present Rule of Decision in the Courts of this State. . . ."

Article 5519a was first enacted in 1930.[67] It was amended the following year, taking its present form.[68] The only difference in language was that the words "fifty" and "twenty," respectively, appeared in the earlier statute where "twenty-five" now appears. The caption of the earlier act stated an intent "to provide a period of time when continuity of failure to exercise dominion over land, or pay taxes thereon shall prima facie prove title to persons exercising dominion over, and paying taxes on such land."

Section 1 of article 5519a falls short of being a true statute of limitation. Suit for recovery of land is not absolutely barred if the elements of the statute are made out. The several elements merely

[67] Tex. Acts 1930, 41st Leg., 5th C.S. 7, ch. 30.
[68] Tex. Acts 1931, ch. 169.

constitute "prima facie proof" that title has passed from the apparent record owner to the person exercising dominion over the land. It is still open to the record owner to show by evidence that title has not passed.[69] A presumption is created by the statute which can be overcome if the record owner comes forward with evidence.

The opening phrase in the statute limits its operation to suits in which the state is not a claimant of the land. Then follow the elements which "constitute prima facie proof that title . . . [has] passed." Explanation of the elements has been made in *Whelan v. Henderson*:[70]

> It will be observed that this statute as against one holding the apparent record title to property to establish prima facie title to the property it is necessary for the claimant to prove by preponderance of the evidence the following facts: (1) That those holding such apparent legal title either have not paid taxes for twenty-five years, or have not exercised dominion one or more years during the period of twenty-five years next preceding the filing of the suit; (2) that the claimants, or those whose estate they own, have openly exercised dominion over and asserted claim to same and have paid taxes thereon annually before becoming delinquent for as many as twenty-five years during such a period. The twenty-five years, of course, elapsing next preceding the filing of the suit. The first requirement involves the proving of one or the other of the two negative alternatives.
>
> Under number two the claimant must establish the following affirmative facts conjunctively: (a) claimants and those under whom they claim have openly exercised dominion over, (b) and asserted claim to same, (c) and have paid taxes thereon annually before becoming delinquent for the entire twenty-five years. The failure to establish any one of the facts listed under subdivisions a, b and c is fatal to the claim.

On the whole, this analysis of section 1 of article 5519a seems sound, although, as will be seen, some questions remain unanswered.

Instead of using the expression "peaceable and adverse possession," the section uses the term "dominion." One who asserts the statutory presumption must show that he or his predecessors have "openly exercised dominion over and asserted claim" to the land. The Legislature was undoubtedly aware of the meaning and content of the expression "peaceable and adverse possession." Thus, it is easy

[69] Whelan v. Henderson, 137 S.W.2d 150, 153 (Tex. Civ. App. 1939) error dism. judgm. cor.; W.T. Carter & Bros. v. Rhoden, 72 S.W.2d 620 (Tex. Civ. App. 1934) error dism.; Kellogg v. Southwestern Lumber Co., 44 S.W.2d 742 (Tex. Civ. App. 1931) error ref. (but on rehearing the court said that article 5519a should not be regarded because it was enacted long after the suit was filed).

[70] Supra note 69, at 153.

to conclude that something else was intended by the use of the term "dominion."

Several decisions have stated that "dominion over land" requires less of a claimant than does "peaceable and adverse possession."[71] But "dominion" at its minimum signifies physical acts done on the land throughout the 25-year period. The acts may be done intermittently and irregularly, but a single brief entry or several brief entries at widely separated intervals are not enough.[72] In a case in which the claimants' evidence of dominion was sketchy, the court said:

> We recognize the authorities which hold that something less than physical occupation or possession of the land is sufficient to establish the element of "dominion". So far as this record reflects, however, neither appellees nor those under whom they claim have ever even seen the land which is the subject of this suit. There is no evidence that the land has been inspected, patrolled, grazed or subjected to any use whatsoever by any of the parties to this suit, or by anyone else. While we would not require appellees to prove continuous physical control over the land in order to show an exercise of dominion over it, we do believe there must be a showing of some physical conduct on the land itself to establish the element of "openly exercised dominion" required to satisfy the statute, Article 5519a.[73]

Whelan v. Henderson[74] makes a point of saying that exercise of dominion and assertion of claim are separate elements in section 1 of article 5519. But the elements are clearly related. In *Wiggins v. Houston Oil Co.*[75] the court declared:

> Dominion obviously refers to conduct under claim. The same act, of course, might prove both claim and dominion; but an act which expresses claim might not amount to dominion. The term dominion, distinguished as it is from claim suggests conduct upon the land itself, such as a patrol across the land to determine whether trespassers have settled upon it; and this court has held that such patrols constitute acts of dominion.

The court went on to observe that the character of the land has a bearing on the nature, duration, number, and spacing of acts of dominion required under the statute. A claimant of uninhabited land "would ordinarily make only such entries . . . as would protect him from loss of timber and wrongful possession. Yet these acts may well

[71] E.g., King v. Hester, 200 F.2d 807 (5th Cir. 1952).

[72] See Gilbert v. Lobley, 231 S.W.2d 969 (Tex. Civ. App. 1950), aff'd, 149 Tex. 493, 236 S.W.2d 121 (1951); Wiggins v. Houston Oil Co., 203 S.W.2d 252 (Tex. Civ. App. 1947) error ref. n.r.e.

[73] Purnell v. Gulihur, 339 S.W.2d 86, 91 (Tex. Civ. App. 1960) error ref. n.r.e.

[74] 137 S.W.2d 150 (Tex. Civ. App. 1939) error dism. judgm. cor.

[75] 203 S.W.2d 252, 258 (Tex. Civ. App. 1947) error ref. n.r.e.

satisfy the dominion requirement of article 5519a."[76] Sufficient exercise of dominion may be found in "an accumulation of incidents which separately may affect only a part of the land claimed but which show as a whole that the claimant has assumed to exercise control of all of said land throughout the 25 year statutory period."[77]

Several cases have arisen in which the mineral estate in land has been severed and later someone claims it under article 5519a. Thus, a grantor may convey a mineral estate, and later he (or his successor) may assert the presumption that the estate has passed back to him. Or a grantee of land (or his successor) may assert the presumption with respect to a mineral estate which was excepted by the grantor in his deed. Another possibility is the claim of a third party having no connection with the title who enters upon land after the minerals have been severed (by grant or exception). In each of these situations acts of open dominion must be done (entry and some kind of user) with respect to the subsurface in order for the claimant to have prima facie proof of passing of title, and occupation of the surface is not enough.[78] Nonuser by the owner of the mineral estate is no substitute for acts of dominion on the part of the adverse claimant.

Besides exercising dominion over the land and claiming it, one must pay "taxes thereon annually before becoming delinquent for as many as twenty-five years during such period" in order to have the advantage of article 5519a. Does this mean that the adverse claimant must make timely tax payments over a period of 25 consecutive years? Or is it sufficient that he make timely tax payments in 25 nonconsecutive years if from the first to the last he has exercised dominion over and claimed the land and the record owner has failed to pay taxes or to exercise dominion? The latter interpretation is supported by the considerations that if the Legislature had intended otherwise, the obvious word, "consecutive," would have been inserted; and that the phrase "for as many as twenty-five years during such period" can be read as specifying the number of times that prompt tax payments must be made. Under this interpretation failure to pay taxes before delinquent in any year would cause the necessary period of dominion and claim to be extended for a year. This would

[76] Id. at 259.

[77] 203 S.W.2d 252, 259 (Tex. Civ. App. 1947) error ref. n.r.e.

[78] Carminati v. Fenoglio, 267 S.W.2d 449 (Tex. Civ. App. 1954) error ref. n.r.e. (grantors excepted minerals); Pagel v. Pumphrey, 204 S.W.2d 58 (Tex. Civ. App. 1947) error ref. n.r.e. (same); see King v. Hester, 200 F.2d 807, 815 (5th Cir. 1952) (mineral estate conveyed to grantee); Wiggins v. Houston Oil Co., 203 S.W.2d 252, 260 (Tex. Civ. App. 1947) error ref. n.r.e.; West v. Hapgood, 169 S.W.2d 204, 215 (Tex. Civ. App.) (dissent), aff'd on other grounds, 141 Tex. 576, 174 S.W.2d 963 (1943).

appear preferable to compelling the adverse claimant to start the 25-year period all over again.

A recent case adopts the preferred interpretation,[79] but others are against it.[80] It must be conceded that there are grounds for holding that timely payment of taxes must occur during 25 consecutive years. For the statute to operate, the apparent record owner must not have exercised dominion over the land or paid taxes "one or more years during the *period* of twenty-five years next preceding the filing of . . . suit and during such *period*" the adverse claimant must have exercised dominion over and asserted claim and paid taxes annually before they became delinquent "for as many as twenty-five years during such *period*." (Emphasis added.) The repetition of the word "period," and its initial definition as the 25 years next preceding the filing of suit argue for the congruence of the first and last periods and, therefore, for consecutiveness of the timely tax payments.

Whelan v. Henderson relies on the use of the disjunctive in the first part of the statute and asserts that an adverse claimant need only show that the apparent record owner has not exercised dominion over the land in question, *or* has not paid taxes thereon, for one or more years during the 25 years preceding the filing of suit. One may query whether either alternative is sufficient of itself. For instance, if the apparent record owner fails to pay taxes but exercises dominion over the land for a year or more, it is not believed that the presumption will arise. The explanation is that the adverse claimant does not effectively exercise dominion during such periods as the apparent record owner exercises dominion. For another instance, it is not believed that the presumption will arise if the apparent record owner fails to exercise dominion over the land but tenders and pays the taxes before the adverse claimant does. In this situation the adverse claimant cannot comply with the requirement of paying the taxes. Still another question is the meaning of the requirement that the apparent record owner has not "exercised dominion over . . . [the] land . . . one or more years" during the 25-year period preceding the filing of suit. The clear implication is that exercise of dominion for less than a year will not prevent the statutory presumption from operating. It remains to be seen what

[79] Purnell v. Gulihur, 339 S.W.2d 86, 91 (Tex. Civ. App. 1960) error ref. n.r.e.

[80] Pagel v. Pumphrey, 204 S.W.2d 58, 65 (Tex. Civ. App. 1947) error ref. n.r.e.; Caver v. Liverman, 180 S.W.2d 448 (Tex. Civ. App. 1944), aff'd, 143 Tex. 359, 185 S.W.2d 417 (1945); Olive-Sternenberg Lumber Co. v. Gordon, 143 S.W.2d 694 (Tex. Civ. App. 1940), rev'd on other grounds, 138 Tex. 459, 159 S.W.2d 845 (1942); Duke v. Houston Oil Co., 128 S.W.2d 480, 486 (Tex. Civ. App. 1939) error dism. judgm. cor.

kind of acts over a year's period will amount to dominion defeating the adverse claimant's prima facie proof that title has passed.

Even though an adverse claimant fails in making prima facie proof under article 5519a, he may yet win judgment on evidence and circumstances which lead the trier of facts to find that a conveyance has been made. Section 2 of article 5519a preserves "the right to prove title by circumstantial evidence under the present Rule of Decision in the Courts of this State." Apart from statute, the common law permits a finding that land has been conveyed where the original record owner and his successors have not occupied or claimed it for decades, the present claimant and his predecessors have comported themselves as owners for the same period, and the evidence points to a transaction between the original record owner and the claimant's predecessor in which a deed is supposed to have been executed. The finding is not dependent upon the existence of "peaceable and adverse possession," "dominion," or other statutory concepts.

A good example is *Purnell v. Gulihur*.[81] The plaintiffs sued for an 80-acre tract of land, claiming under a deed from Blair to Goodhart. The deed was not produced in court, but its record was. The deed as recorded did not cover the 80 acres, and the plaintiffs alleged that the recordation was faulty. Conveyances contemporaneous with the deed indicated that the tract was intended to be conveyed. Blair and his heirs had not exercised dominion over the land for 58 years. Goodhart and his successors paid taxes on the land for 40 years. The plaintiffs were barred by the 4-year statute from suing for reformation of the deed. The 10-year statute was not available because their possession and use had been insufficient. Section 1 of article 5519a was not available because the required dominion had not been exercised. Nevertheless, citing section 2 of the same article, the court was of the opinion that circumstantial evidence gave rise to a "presumption of a grant." The judgment below that the original Blair-Goodhart deed covered the 80 acres was upheld.

Another example is *Duke v. Houston Oil Co.*[82] In 1837, Henderson transferred a land certificate for 640 acres to Ryan. In 1841, Ryan transferred the land back to Henderson so that it could be "named" for him. This transfer was recorded in 1848, but in the meantime a patent was issued to Ryan in 1842. Years later the plaintiffs claimed an undivided interest in the 640 acres as successors of Henderson. The plaintiffs and their predecessors had not occupied

[81] 339 S.W.2d 86 (Tex. Civ. App. 1960) error ref. n.r.e.
[82] 128 S.W.2d 480 (Tex. Civ. App. 1939) error dism. judgm. cor.

or claimed the land for 90 or 95 years, and they never had paid taxes. The defendants claimed as successors of Ryan, had paid taxes for 31 years, and had cruised and inspected the land every year for the same period. The defendants met the requirements of prima facie proof of passing of title except in that their payments of taxes before delinquent had not been consecutive (because of a single lapse) for 25 years. The court of civil appeals held that the circumstantial evidence was sufficient to support the trial court in presuming that Henderson conveyed his title back to Ryan. The court said, "Our conclusion is supported by the policy of our courts to extend and not restrict the application of proof of title by circumstances, where there has been a long non-claim by the plaintiffs and an active possession and claim by the defendants. Also it is supported by the public policy of the State, as reflected by article 5519a. . . ."[83] Other cases have similar expressions that a court may infer or presume a grant where the apparent record owner of land and his successors acquiesce over a long time in the claims and proprietary conduct of others.[84]

After an adverse claimant makes the showing required by article 5519a, if the apparent record owner offers no opposing evidence, the former is entitled to a directed verdict. If the latter offers some substantial evidence that title has not passed, does the presumption vanish from the case, and is he entitled to judgment unless the adverse claimant presents additional evidence? Explicit answers to these questions are lacking, but some principles can be stated. The presumption of the article has basis in logic and common experience. When the apparent record owner offers some substantial evidence against the adverse claimant's prima facie proof, the presumption as a legal "extra" should disappear from the case. But the trier of facts should still be free to weigh the proofs on both sides, to conclude that the inferences from the adverse claimant's proof are stronger than the opposing evidence, and to find that title has passed.[85] This is done in cases which are outside the stat-

[83] Id. at 486.

[84] See West v. Hapgood, 141 Tex. 576, 174 S.W.2d 963 (1948), affirming 169 S.W.2d 204 (Tex. Civ. App. 1943) (authority of agent to convey presumed); Olive-Sternenberg Lumber Co. v. Gordon, 138 Tex. 459, 159 S.W.2d 845 (1942), reversing 143 S.W.2d 694 (Tex. Civ. App. 1940) (laches and stale demand bar claim of record owner); Adams v. Brown, 113 S.W.2d 310 (Tex. Civ. App. 1937) (presumption of grant).

[85] Cf. Kellogg v. Southwestern Lumber Co., 44 S.W.2d 742, 749 (Tex. Civ. App. 1931) error ref.:

> [F]or, even if appellee is correct on the facts, it proved only a prima facie title, which was destroyed when all the facts came in, making the issue of title one of fact for the jury. The only effect of this article is to cast upon "those holding the apparent record title" the burden of proving that their title has not passed to "the opposing parties." That the title passes under

ute,[86] and no reason appears that it should not be done in a case where prima facie proof is made under article 5519a. Indeed, cases in which an adverse claimant has been successful under the article disclose that it has been done without particular notice or comment.

V. Suggestions and Conclusions

A. *Suggestions*

An old maxim of interpretation is that statutes in derogation of the common law should be narrowly construed. A more modern maxim is that statutes affecting the public welfare should be broadly construed to effectuate the purposes of the legislation. It is not certain that the first maxim applies to real property statutes of limitation, since they have a history almost as old as the common law and since doctrines analogous to the statutes have been developed by the courts. Nor is it certain that the second maxim applies, since it was developed and has operation in legislative areas quite different from real property limitation statutes.

It is best to say, and, indeed, impeccably correct to say, that the courts should follow the manifested intent of the legislature in construing statutes of limitation. Most of the statutes provide for lengthy periods during which an adverse claimant must possess or exercise dominion over land. One may venture to assert that the legislatures did not intend to invite technical constructions which defeat adverse claimants without adding anything material in the way of notice to the owner of the land during the period of adverse claim.

The writer has a bias in favor of sympathetic interpretation and application of statutes of limitation to the end that adverse claimants may acquire title to land. The bias is limited, however, in this: An adverse claimant should be held to all the requirements of the statutes, but he should not be defeated by narrow constructions which do not accomplish anything material in giving notice of his claim to the owner during the period of adverse possession or dominion. With this bias stated, the writer proceeds to suggestions concerning the several 25-year statutes.

1. *The Proviso to Article 5518*

The proviso should be left intact and interpreted according to its terms. Under the proviso a person suffering legal disability is barred

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the provisions of this article is a presumption of law and not of fact, and when evidence is offered against this presumption, as appellants have done in this case, the presumption disappears as a rule of law, and the case is in the hands of the jury, free from the conditions of this article.

[86] See cases cited supra notes 81, 82, 84.

from suing to recover land 25 years after his cause of action accrues if the adverse claimant has otherwise satisfied the requirements of the 3, 5, or 10-year statute. Equitable suits to annul deeds are not barred by the proviso (or by the 3, 5, or 10-year statutes), but they are taken care of, at least in part, by article 5519.

2. *Article 5519*

The construction of this statute has been satisfactory. But two suggestions are made. First, the phrase, "in good faith," should be deleted. The phrase has been little noticed and applied, and what is required is unclear. Surely the statute was intended to allow adverse occupiers to gain title who have varying degrees of consciousness that their possession is wrongful. To the extent that "good faith" is an element connected with the character of instrument under which an adverse possessor must claim, the courts can be trusted not to go too far in accepting for the purpose of the statute instruments which are forged or stolen.

Second, the article should be amended to make clear that any suit, the ultimate object of which is to recover land, is barred by compliance with its terms. In particular, suits to cancel deeds for reasons of fraud, duress, or mistake should be barred whether or not the victims of the wrongs were under legal disability when their causes of action accrued. The present language says that compliance with the statute overcomes the tolling effect of legal disabilities and may be interpreted as having no effect on causes of action for undiscovered fraud or mistake (or duress which is continuing). It is suggested that the phrase "including a right of action to cancel a deed," be inserted in the first sentence of article 5519 immediately after the opening expression, "No person who has a right of action for the recovery of real estate."

3. *Article 5519a*

Two suggestions are made here. The disjunctive in the first part of section 1 would indicate that an adverse claimant need only show that the apparent record owner has not exercised dominion over the land, *or* has not paid taxes thereon, one or more years in the 25-year period preceding the filing of suit. It is believed that the rest of the section actually obliges the adverse claimant to prove both alternatives. Confusion will be avoided by changing the word "or" to "and."

The second suggestion is that section 1 be amended to say clearly that the timely payment of taxes by the adverse claimant may take place in nonconsecutive years. The interpretation that the adverse claimant must start all over again to build his prima facie proof if he

happens one year to pay taxes after they become delinquent seems unduly strict. Extension of the necessary period of dominion and claim for another year is entirely adequate protection to the apparent record owner. The amendment can be accomplished by the addition of a sentence: "Payment of taxes before delinquent in twenty-five nonconsecutive years is sufficient if the opposing parties and those whose estate they own openly exercise dominion over and assert claim to the land from the date of the first timely payment to the date of the twenty-fifth timely payment."

B. *Conclusion*

The 25-year statutes of limitation in Texas serve as catch-all legislation, barring suits for land where shorter statutes of limitation, for one reason or another, are ineffective. The 25-year statutes complement one another, though not perfectly. Common-law doctrine of long and respectable standing may work in favor of an adverse claimant who fails to satisfy statutory requirements. Texas has, perhaps in greater measure than most states, given proper consideration to the policy of repose in the matter of land titles. The several amendments of the 25-year statutes here suggested have no drastic character, and it is believed that they would cure uncertainties without impairing the basic structure of Texas real property limitation law.